

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

IN THE MATTER OF:

BRONX GENERAL POST OFFICE
NEW YORK, NY 10451

DOCKET No. A2013-6

**SURREPLY OF THE UNITED STATES
POSTAL SERVICE TO DR. HUTKINS' REPLY**
(August 5, 2013)

On July 29, 2013, Dr. Steve Hutkins filed a Reply to the Postal Service Motion to Dismiss Proceedings (Reply) on behalf of Petitioners Lizette Colón, Julio Pabón and Mike Eilenfeldt. In his reply, Dr. Hutkins argued that pursuant to 39 C.F.R. § 241.4(d)(2), the discontinuance procedure required by 39 U.S.C. § 404(d) and 39 C.F.R. 241.3 should apply to the relocation of the Bronx General Post Office (Bronx GPO). Dr. Hutkins advances three main arguments supporting his position; however, all rely on a flawed and incorrect interpretation of Section 241.4(d)(2). Moreover, taken in its entirety, the Reply is a veiled attempt to persuade the Commission to reverse longstanding precedent that relocations fall outside the jurisdiction of the Commission. The Postal Service's surreply will clarify the meaning and purpose of section 241.4(d)(2).

ARGUMENT

1. Section 241.4 and the NHPA are Read Independently From One Another.

Dr. Hutkins' July 29, 2013 reply in opposition to the Postal Service's Motion to Dismiss relies on a misinterpretation of 39 C.F.R. § 241.4(d)(2). Section 241.4(d)(2) does not support his argument that the Postal Service is required to apply section

404(d) to relocation actions involving historic property. The paragraph in question states:

Any action involving the closing or other discontinuance of a post office shall be undertaken only in accordance with 39 U.S.C. § 404(b) and 39 C.F.R. § [241.3]. In the event a facility action is subject to both this section, and either the NHPA or the post office discontinuance requirements, all comment periods and other public participation matters shall be governed by those statutes.

39 C.F.R. § 241.4(d)(2). Dr. Hutkins asserts that 39 C.F.R. § 241.4(d)(2) means that whenever a relocation also involves a historic property covered by the National Historic Preservation Act (NHPA), that facility action is necessarily governed by the discontinuance statutes, *i.e.*, 39 U.S.C. § 404(d) along with its implementing regulations in 39 C.F.R. § 241.3. Petitioner's Reply at 2.

This is not so. Instead, the plain language of 39 C.F.R. § 241.4(d)(2) shows that a section 241.4 facility action subject to the NHPA *or* the discontinuance requirements "shall be governed by those statutes." "[T]hose statutes" refer to the NHPA *or* 39 U.S.C. § 404(d), as applicable, and not solely to the discontinuance rules. The legislative history behind section 241.4 is instructive in this understanding. Section 241.4(d)(2) applies not only to relocations, but also to repair, maintenance, expansion, and new construction. See Expansion, Relocation, Construction of New Post Offices, 63 Fed. Reg. 46,656 (1998) (to be codified as 39 C.F.R. § 241.4). Independently, the NHPA provides for a process by which federal agencies are to take into account the effects of undertakings on historic properties. See 36 C.F.R. § 800.1 et. seq. After receiving comments from respondents that were concerned that the interim regulations were intended to circumvent the requirements of the NHPA, the Postal Service modified Section 241.4(d)(2) to provide some assurance that when a facility action covered by 39

C.F.R. § 241.4 is also subject to the NHPA, the Postal Service would follow both 39 C.F.R. § 241.4 and the NHPA. See 63 Fed. Reg. 46656. Nothing more or less is intended by this regulation.

2. Section 241.4 Was Not Intended to Change Compliance with the NHPA.

In his reply, Dr. Hutkins admits that compliance with the NHPA is “an issue for another venue.” Reply at 9. Despite this admission, Dr. Hutkins continues to attempt to link the NHPA with section 241.4. As discussed above, the changes to Section 241.4(d)(2) were intended to assuage concerns that section 241.4(d) was gutted by the changes to section 241.4(a)(2). 63 Fed. Reg. 46656. The Postal Service inserted the new language to clarify that the Postal Service would comply with Section 106 of NHPA. *Id.* Nothing in the language was intended to expand or contract the scope of section 404(d):

Nothing in the interim rule or this final rule is meant to avoid or diminish the Postal Service’s compliance with historic preservation policies.... If any project, including repair maintenance, alternation, expansion, relocation, or new construction, will have an adverse effect under provisions of the NHPA or executive orders, the Postal Service will continue to consider and mitigate such effects independently from this rule. Accordingly, in order to prevent any misunderstanding, we have revised 241.4(d).

Id. Dr. Hutkins’ contention that this language was an expansion is not borne out by the actual language or the regulatory history.

3. The Bronx Facility Action is Only a Relocation.

Dr. Hutkins’ contentions that an action can be a relocation and a discontinuance relies on his persistent misinterpretation of the plain language of section 241.4. See Reply at 13-15. What Dr. Hutkins fails to draw to the attention of the Commission is that

the example he references concerns the combination of two retail facilities and moving services to a new facility, not merely the relocation of single postal retail unit.

A relocation alone, however, would not trigger compliance with the discontinuance rules because 39 C.F.R. § 241.3(a)(1)(C) expressly provides that section 241.3 applies to a “discontinuance” of a Postal Service operated post office “*without providing a replacement facility.*” 39 C.F.R. § 241.3(a)(1)(C) (emphasis added). In turn, that regulation defines a “discontinuance” to mean either a closure or consolidation, and a “closing” means “an action in which Post Office operations are permanently discontinued *without providing a replacement facility in the community.*” 39 C.F.R. 241.3(a)(2)(iii) and (v) (emphasis added). *See also Knapp v. United States Postal Service*, 449 F. Supp. 158, 162 (E.D. Mich. 1978) (“Closing’...refers to the complete elimination of the post office”). When, as in the case before the Commission, the Postal Service relocates a customer retail facility *and* provides a replacement facility in the community, the discontinuance rules do not apply.

Dr. Hutkins’ attempts to have the Commission reverse itself and extend its jurisdiction to relocation appeals should be firmly rejected.

CONCLUSION

This appeal concerns the relocation of a Post Office. As a result, 39 U.S.C. § 404(d) and 39 C.F.R. § 241.3 do not apply and the Commission lacks jurisdiction to hear the appeal. For the reasons discussed above, the Postal Service respectfully requests that the Postal Regulatory Commission dismiss this appeal for lack of jurisdiction.

Respectfully submitted,

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